DEPARTMENT OF TRANSPORTATION [4910-06-P]

Federal Railroad Administration

49 CFR Part 239

[Docket No. FRA-2011-0062, Notice No. 1]

2130-AC33

Passenger Train Emergency Preparedness

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA is proposing to revise its regulations for passenger train emergency preparedness. These proposed revisions would: ensure that railroad personnel who communicate and coordinate with first responders during emergency situations receive initial and periodic training and are subject to operational (efficiency) tests and inspections; clarify that railroads must develop procedures in their emergency preparedness plans (e-prep plans) addressing the safe evacuation of passengers with disabilities during emergency situations; limit the need for FRA to formally approve purely administrative changes to approved e-prep plans; specify new operational (efficiency) testing and inspection requirements for both operating and non-operating employees; and remove as unnecessary the section on the preemptive effect of the regulations.

DATES: *Comments*: Written comments must be received by [**INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**]. Comments received after that date will be considered to the extent possible without incurring additional

expense or delay.

Hearing: FRA anticipates being able to resolve this rulemaking without a public, oral hearing. However, if FRA receives a specific request for a public, oral hearing prior to [**INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**], one will be scheduled and FRA will publish a supplemental notice in the Federal Register to inform interested parties of the date, time, and location of any such hearing.

ADDRESSES: Comments: Comments related to Docket No. FRA-2011-0062, Notice No. 1, may be submitted by any of the following methods:

- Web site: The Federal eRulemaking Portal, www.regulations.gov. Follow the Web site's online instructions for submitting comments.
- Fax: 202-493-2251.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12-140, Washington, DC 20590.
- Hand Delivery: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12-140 on the Ground level of the West Building, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name, docket name and docket number or Regulatory Identification Number (RIN) for this rulemaking (2130-AC33). Note that all comments received will be posted without change to http://www.regulations.gov, including any personal information provided. Please see the Privacy Act heading in the SUPPLEMENTARY INFORMATION section of this document

for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to http://www.regulations.gov at any time or visit the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12-140 on the Ground level of the West Building, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Daniel Knote, Staff Director, Passenger Rail Division, U.S. Department of Transportation, Federal Railroad Administration, Office of Railroad Safety, Mail Stop 25, West Building 3rd Floor, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: 202-493-6350); or Brian Roberts, Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, Mail Stop 10, West Building 3rd Floor, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: 202-493-6056).

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

FRA is issuing this NPRM to revise FRA's passenger train emergency preparedness regulations. This NPRM is intended to clarify certain requirements and address issues that have arisen since the regulations were issued in May 1998. This NPRM is based on language developed by the General Passenger Safety Task Force (Task Force), a subgroup of the Railroad Safety Advisory Committee (RSAC), to resolve four main issues involving

the regulations. The Task Force developed recommendations principally to: (1) ensure that railroad personnel who communicate and coordinate with first responders during emergency situations receive initial and periodic training and are subject to operational (efficiency) tests and inspections under part 239; (2) clarify that railroads must develop procedures in their e-prep plans addressing the safe evacuation of passengers with disabilities during an emergency situation; (3) limit the need for FRA to formally approve purely administrative changes to approved e-prep plans; and (4) specify new operational (efficiency) testing and inspection requirements for both operating and non-operating employees for railroads covered by part 239. The recommendations developed by the Task Force were approved by the full RSAC, and they form the basis of this NPRM.

Among the NPRM's main proposals, the rule would:

- Clarify the types of railroad personnel who are required to be trained or be subjected to operational (efficiency) testing and inspections under part 239. This would include railroad personnel who directly coordinate with emergency responders;
- Clarify that operational (efficiency) testing under part 239 can be conducted under and considered part of the railroad's efficiency testing program under 49 CFR part 217;
- Allow purely administrative changes to railroad e-prep plans to be excluded from the formal review and approval process required for more substantive amendments to e-prep plans under part 239;
- Clarify that railroads must include procedures in their e-prep plans addressing the safe evacuation of persons with disabilities during emergency situations as well as

full-scale simulations of emergency situations; and

- Remove as unnecessary the section on the preemptive effect of the regulations.

In analyzing the economic impacts of this proposed rule, FRA found that proposed regulatory changes would enhance the emergency planning process currently in place in part 239. FRA has quantified the costs associated with this NPRM. Any additional costs associated with amending part 239 would be mostly related to the inclusion of additional personnel in the testing and training programs required by part 239. Railroads would see reduced burdens in the filing and approval process of e-prep plans with non-substantive changes. The industry, however, would be subject to additional burden from minor new requirements for the submission of e-prep plans to make the review and approval of e-prep plans more efficient. Total costs over the next 10 years are estimated to be $1,049,308 (or present value of $734,922 when discounted at 7 percent).

FRA has analyzed the benefits associated with this rule. Benefits would accrue from the increased likelihood that the passenger railroads would handle external communications more efficiently, expediting the arrival of emergency responders to the accident scene, and from the ability of the railroad personnel to minimize health and safety risks through improved internal and external communications. FRA utilized a break-even analysis to quantify the minimum safety benefits necessary for the proposed rule to be cost-effective, considering the estimated quantified costs. The break-even point was found to be a reduction in severity of 3.84 injuries from Abbreviated Injury Scale (AIS) level 2 to AIS level 1. Safety benefits are estimated to total $1,091,200 when four injuries have their severity mitigated from AIS 2 to AIS 1. Total discounted benefits are estimated to be

$735,757 (PV 7 percent). The benefits for this proposed rule would exceed the estimated costs when four injuries are prevented from increasing in severity from an AIS 1 to an AIS 2. FRA believes the proposed changes in this rulemaking will more than exceed the break-even estimate.

II. Background

A. 1998 Passenger Train Emergency Preparedness Final Rule

On May 4, 1998, FRA published a final rule on passenger train emergency preparedness that was codified at 49 CFR part 239. See 63 FR 24629 (May 4, 1998). The rule addresses passenger train emergencies of various kinds, including security situations, and sets minimum Federal safety standards for the preparation, adoption, and implementation of e-prep plans by railroads connected with the operation of passenger trains. The existing rule requires e-prep plans to include elements such as communication, employee training and qualification, joint operations, tunnel safety, liaison with emergency responders, on-board emergency equipment, and passenger safety information. Under the requirements of the rule, each affected railroad is required to instruct its employees on the applicable provisions of its plan. In addition, the plan adopted by each railroad is subject to formal review and approval by FRA. The rule also requires each railroad operating passenger train service to conduct emergency simulations to determine its capability to execute the e-prep plan under the variety of emergency scenarios that could reasonably be expected to occur.

In promulgating the rule, FRA also established specific requirements for passenger train emergency systems. Among these are requirements that all emergency window exits

and windows intended for rescue access by emergency responders be marked accordingly and that instructions be provided for their use. In addition, FRA established requirements that all door exits intended for egress be lighted or marked, all door exits intended for rescue access by emergency responders be marked, and that instructions be provided for their use.

B. 2008 Passenger Train Emergency Systems (PTES I) Final Rule

In 2008, FRA revisited requirements for emergency systems on passenger trains by enhancing existing requirements for emergency window exits and establishing new requirements for rescue access windows used by emergency responders to evacuate passengers. See 73 FR 6369 (February 1, 2008). While this final rule did not make any changes to the passenger train emergency preparedness regulations, the rule expanded existing requirements that were previously only applicable to passenger trains operating at speeds in excess of 125 mph but not exceeding 150 mph (Tier II passenger trains) to passenger trains operating at speeds not exceeding 125 mph (Tier I passenger trains), see § 238.5. Specifically, Tier I passenger trains were required to be equipped with public address and intercom systems for emergency communication, as well as provide emergency roof access for use by emergency responders. FRA applied certain requirements to both existing and new passenger equipment, while other requirements applied only to new passenger equipment.

C. 2012 Passenger Train Emergency Systems (PTES II) NPRM

On January 3, 2012, FRA published an NPRM proposing to enhance existing requirements as well as create new requirements for passenger train emergency systems. See 77 FR 154 (January 3, 2012). The NPRM proposes to add emergency passage

requirements for interior vestibule doors as well as enhance emergency egress and rescue access signage requirements. The NPRM also proposes requirements for low-location emergency exit path markings, the creation of minimum emergency lighting standards for existing passenger cars, and enhancements to existing requirements for the survivability of emergency lighting systems in new passenger cars.

Additionally, the NPRM proposes changes to FRA's passenger train emergency preparedness regulations in part 239. These changes include clarifying existing requirements for participation in debriefing and critique sessions following both passenger train emergency situations and full-scale simulations. Under the current regulation, a debriefing and critique session is required after each passenger train emergency situation or full-scale simulation to determine the effectiveness of the railroad's e-prep plan. See § 239.105. The railroad is then required to improve or amend its plan, or both, in accordance with the information gathered from the session. Language proposed in the PTES II NPRM clarifies that, to the extent practicable, all on-board personnel, control center personnel, and any other employee involved in the emergency situation or full-scale simulation shall participate in the debriefing and critique session. The proposed rule would also clarify that employees be provided flexibility to participate in the debrief and critique sessions through a variety of different methods.

D. The Need for Revisions to Passenger Train Emergency Preparedness Regulations

Among FRA's reasons for initiating this rulemaking, FRA learned that there was confusion regarding certain requirements within FRA's passenger train emergency preparedness regulations. For example, FRA learned that some passenger railroads were

confused as to which types of railroad personnel were required to be trained or be subjected to operational (efficiency) testing and inspections under part 239. These railroads were unclear whether part 239 required certain railroad personnel who directly coordinate with emergency responders and other outside organizations during emergency situations to be trained or be subjected to operational (efficiency) testing and inspections. As a result, FRA believes that it is necessary to clarify the regulatory language in part 239 to ensure that railroad personnel who directly coordinate with emergency responders actually receive the proper training and are subject to operational (efficiency) testing and inspections. FRA also learned that many railroads were unclear whether operational (efficiency) testing under part 239 could be considered for purposes of the railroad's efficiency testing program required under 49 CFR part 217.

In addition, as a result of FRA's experience in reviewing and approving passenger railroads' e-prep plans that are updated periodically, FRA realized that a number of the changes were purely administrative in nature. While part 239 currently subjects all changes to an e-prep plan to a formal review and approval process, FRA believes that such purely administrative changes should be excluded from the process so that the agency can focus its resources on more substantive matters.

Finally, FRA believed it was necessary to clarify part 239 to address the requirements of Executive Order 13347. 69 FR 44573 (July 26, 2004). Executive Order 13347 requires, among other things, that Federal agencies encourage State, local, and tribal governments, private organizations, and individuals to consider in their emergency preparedness planning the unique needs of individuals with disabilities whom they serve.

While under part 239 the unique needs of passengers with disabilities must already be considered in the railroads' e-prep plans, the NPRM would clarify the railroads' responsibilities.

E. RSAC Overview

In March 1996, FRA established RSAC as a forum for collaborative rulemaking and program development. RSAC includes representatives from all of the agency's major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. A list of member groups follows:

- American Association of Private Railroad Car Owners (AAPRCO);
- American Association of State Highway and Transportation Officials (AASHTO);
- American Chemistry Council;
- American Petroleum Institute;
- American Public Transportation Association (APTA);
- American Short Line and Regional Railroad Association (ASLRRA);
- American Train Dispatchers Association (ATDA);
- Association of American Railroads (AAR);
- Association of Railway Museums;
- Association of State Rail Safety Managers (ASRSM);
- Brotherhood of Locomotive Engineers and Trainmen (BLET);
- Brotherhood of Maintenance of Way Employees Division (BMWED);
- Brotherhood of Railroad Signalmen (BRS);
- Chlorine Institute;

- Federal Transit Administration (FTA);*
- Fertilizer Institute;
- High Speed Ground Transportation Association;
- Institute of Makers of Explosives;
- International Association of Machinists and Aerospace Workers;
- International Brotherhood of Electrical Workers;
- Labor Council for Latin American Advancement;*
- League of Railway Industry Women;*
- National Association of Railroad Passengers (NARP);
- National Association of Railway Business Women;*
- National Conference of Firemen & Oilers;
- National Railroad Construction and Maintenance Association (NRCMA);
- National Railroad Passenger Corporation (Amtrak);
- National Transportation Safety Board (NTSB);*
- Railway Supply Institute (RSI);
- Safe Travel America (STA);
- Secretaria de Comunicaciones y Transporte;*
- Sheet Metal Workers International Association (SMWIA);
- Tourist Railway Association, Inc.;
- Transport Canada;*
- Transport Workers Union of America (TWU);
- Transportation Communications International Union/BRC (TCIU/BRC);

- Transportation Security Administration (TSA);* and
- United Transportation Union (UTU).

*Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If the task is accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. A working group may establish one or more task forces to develop facts and options on a particular aspect of a given task. The individual task force then provides that information to the working group for consideration. When a working group comes to unanimous consensus on recommendations for action, the package is presented to the full RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff members play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation, and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goal, is soundly supported, and is in accordance with policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. However, to the maximum extent practicable, FRA

utilizes RSAC to provide consensus recommendations with respect to both proposed and final agency action. If RSAC is unable to reach consensus on a recommendation for action, the task is withdrawn and FRA determines the best course of action.

F. Passenger Safety Working Group

The RSAC established the Passenger Safety Working Group (Working Group) to handle the task of reviewing passenger equipment safety needs and programs and recommending consideration of specific actions that could be useful in advancing the safety of rail passenger service and develop recommendations for the full RSAC to consider. Members of the Working Group, in addition to FRA, include the following:

- AAR, including members from BNSF Railway Company (BNSF), CSX Transportation, Inc. (CSXT), and Union Pacific Railroad Company (UP);
- AAPRCO;
- AASHTO;
- Amtrak;
- APTA, including members from Bombardier, Inc., Herzog Transit Services, Inc., Interfleet Technology, Inc. (Interfleet, formerly LDK Engineering, Inc.), Long Island Rail Road (LIRR), Maryland Transit Administration (MTA), Metro-North Commuter Railroad Company (Metro-North), Northeast Illinois Regional Commuter Railroad Corporation, Southern California Regional Rail Authority (Metrolink), and Southeastern Pennsylvania Transportation Authority (SEPTA);
- ASLRRA;
- BLET;

- BRS;
- FTA;
- NARP;
- NTSB;
- RSI;
- SMWIA;
- STA;
- TCIU/BRC;
- TSA;
- TWU; and
- UTU.

In 2007, the Working Group tasked the Task Force (General Passenger Safety Task Force) to resolve four issues involving FRA's regulations related to passenger train emergency preparedness. The issues taken up by the Task Force were: (1) ensure that railroad personnel who communicate and coordinate with first responders during emergency situations receive initial and periodic training and are subject to operational (efficiency) tests and inspections under part 239; (2) clarify that railroads must develop procedures in their e-prep plans addressing the safe evacuation of passengers with disabilities during an emergency situation; (3) limit the need for FRA to formally approve purely administrative changes to approved e-prep plans and update FRA headquarters' address; and (4) specify new operational (efficiency) testing and inspection requirements for both operating and non-operating employees for railroads covered by part 239.

While the Task Force was initially charged with updating FRA headquarters' address as it appeared in various regulations found in part 239, FRA has already amended its regulations to update the address of the physical headquarters of FRA and the U.S. Department of Transportation in Washington, DC. See 74 FR 25169 (May 27, 2009).

G. General Passenger Safety Task Force

Members of the Task Force include representatives from various organizations that are part of the larger Working Group. Members of the Task Force, in addition to FRA, include the following:

- AAR, including members from BNSF, CSXT, Norfolk Southern Railway Co., and UP;
- AASHTO;
- Amtrak;
- APTA, including members from Alaska Railroad Corporation, Peninsula Corridor Joint Powers Board (Caltrain), LIRR, Massachusetts Bay Commuter Railroad Company, Metro-North, MTA, New Jersey Transit Corporation, New Mexico Rail Runner Express, Port Authority Trans-Hudson, SEPTA, Metrolink, and Utah Transit Authority;
- ASLRRA;
- ATDA;
- BLET;
- FTA;
- NARP;

- NRCMA;
- NTSB;
- Transport Canada; and
- UTU.

The full Task Force met together on the following dates and in the following locations to discuss the four e-prep-related issues charged to the Task Force:

- July 18-19, 2007, in Chicago, IL;
- December 12-13, 2007, in Ft. Lauderdale, FL;
- April 23-24, 2008, in San Diego, CA; and
- December 3, 2008, in Cambridge, MA.

Staff from the Volpe Center attended all of the meetings and contributed to the technical discussions through their comments and presentations. To aid the Task Force in its delegated task, FRA's Office of Chief Counsel drafted regulatory text for discussion purposes. Task Force members made changes to this draft text. Minutes of each of these Task Force meetings are part of the docket in this proceeding and are available for public inspection. The Task Force reached consensus on all four assigned tasks and adopted the draft text created from its meetings as a recommendation to the Working Group on December 4, 2008.

FRA's Office of Chief Counsel revised the Task Force's recommendation to conform to technical drafting guidelines and to clarify the intent of the recommendation. On June 8, 2009, the Task Force presented both its initial consensus language as well as the consensus language revised by FRA's Office of Chief Counsel to the Working Group. The

Working Group approved the Task Force's initial and revised consensus language at its June 8, 2009 meeting in Washington, DC. The consensus language was then presented before the full RSAC on June 25, 2009, where it was approved by unanimous vote. Thus, the Working Group's recommendation was adopted by the full RSAC as a recommendation to FRA.

While RSAC's recommendation has provided a strong basis for this proposed rule, FRA has varied from the recommendation principally in one substantive way: FRA has declined to adopt the RSAC's recommendation to add language to § 239.101(a)(2)(ii) that would require control center and ERCC personnel to receive initial and periodic training only on those portions of the railroad's e-prep plan that relate to their specific duties under the plan. FRA explains this decision, below. FRA has also made minor changes for purposes of clarity and formatting in the Federal Register, but these changes are not intended to affect the RSAC's consensus recommendation.

III. Section-by-Section Analysis

Subpart A—General

Section 239.5 Preemptive Effect

FRA is proposing to remove this section on the preemptive effect of the regulations. FRA believes that this section is unnecessary because it is duplicative of statutory law at 49 U.S.C. 20106 and case law, which sufficiently address the preemptive scope of FRA's regulations.

Section 239.7 Definitions

FRA is proposing that this section be amended to add a definition for the new term "emergency response communications center" (ERCC) to mean a central location

designated by a railroad with responsibility for establishing, coordinating, or maintaining communication with emergency responders, representatives of adjacent modes of transportation, and appropriate railroad officials during a passenger train emergency. The ERCC may be part of the railroad's "control center." The RSAC recommended that such a definition be added to this section, and FRA agrees with the RSAC's recommendation for the reasons stated below.

Currently, the requirements of part 239 do not specifically apply to ERCC personnel but rather to personnel in a control center, i.e., a central location on a railroad with responsibility for directing the safe movement of trains. The individuals working in these train dispatch centers are subject to emergency preparedness plan training and operational (efficiency) tests and inspections. See 49 CFR 239.101. However, only requiring control center personnel to receive training on a railroad's emergency preparedness plan may be problematic because in many railroads' operational structures train dispatchers only notify internal railroad officials about an emergency situation and provide block protection for the affected train(s) or equipment involved in the incident. While an ERCC can be part of a railroad's dispatch center, most railroads maintain a separate center within their organizational structure that establishes and maintains communications with emergency first responders, adjacent modes of transportation, and appropriate railroad officials. In addition, ERCCs assist in coordinating the actual emergency response with first responders.

This NPRM proposes to define ERCCs, which provide vital services during an emergency situation, and include the definition in various provisions of part 239 that address training, testing, and inspection requirements. By including this definition in the existing

regulation, FRA can expressly require that ERCC personnel, who directly interact with emergency first responders, receive the proper training, testing, and oversight under the regulation to appropriately prepare for and respond to an emergency situation.

The definition of ERCC recommended by the RSAC and that FRA is proposing in this rulemaking provides the railroads with maximum flexibility in designating what centers or groups of individuals within the railroad's organizational structure qualify as ERCCs and are responsible for communicating with the emergency first responders and other outside entities during an emergency situation on the railroad. With this flexibility, each affected railroad can ensure that the correct center or group of individuals within the railroad's organizational structure receives training on the railroad's e-prep plan, and that the center or group of individuals is subject to operational (efficiency) tests and inspections regardless of how the center or group of individuals is organized within the railroad.

Subpart B—Specific Requirements

Section 239.101 Emergency Preparedness Plan

Each railroad subject to the regulation is required to establish an e-prep plan under this section that is designed to safely manage emergencies and minimize subsequent trauma and injury to passengers and on-board personnel. FRA is proposing to revise this section in several different ways. Additional language is being proposed to the following paragraphs of this section: paragraphs (a)(1)(ii), and (a)(2)(ii) through (v). Conversely, this NPRM proposes to remove language from paragraph (a)(2)(ii). Finally, FRA is proposing to create an entire new paragraph (a)(8). Each proposed change to this section is addressed below by paragraph.

Paragraph (a)(1)(ii). As currently written, paragraph (a)(1) requires railroad control center or dispatch personnel to notify outside emergency responders, adjacent rail modes of transportation, and appropriate railroad officials when a passenger train emergency has occurred. However, a number of railroads have found it inefficient to use the control center or railroad dispatcher to perform these duties during an emergency situation because the personnel are likely providing block protection for the incident as well as performing their usual dispatching duties for other parts of the railroad unaffected by the emergency event. Instead, many railroads currently maintain in their organizational structure a separate center or desk within, or even completely separate from, the railroad dispatch center that establishes and maintains communications with internal and external organizations during a railroad emergency. See the discussion in § 239.7, above.

Consequently, FRA is proposing to add specific language to this paragraph that would provide for ERCCs to notify outside emergency responders, adjacent rail modes of transportation, and appropriate railroad officials, when an emergency occurs under the passenger railroad's e-prep plan. Without this proposed language, the regulation would continue to place these responsibilities specifically on control center personnel working in the railroad dispatch office. Instead, the regulation would now clearly recognize that railroads have the flexibility to decide which part of railroad operations should handle these tasks during an emergency situation.

Paragraph (a)(2)(ii). Similar to the proposed change to paragraph (a)(1)(ii), additional language is being proposed to paragraph (a)(2)(ii) that would require ERCC personnel to receive initial and periodic training on appropriate courses of action for each

potential emergency situation. Under this paragraph, initial and periodic training is already required for control center personnel. FRA also proposes adding language to this paragraph clarifying that control center or ERCC personnel can be employees of the railroad, as well as contractors, subcontractors, or employees of a contractor or subcontractor to the railroad. FRA notes that contractors, subcontractors, and employees of a contactor or subcontractor to the railroad are already subject to the requirements of part 239 when performing functions under this part per the requirements of § 239.9. Nonetheless, for clarity FRA is revising the rule text in paragraph (a)(2)(ii) and the text in various other paragraphs of this part to make clear that contractors, subcontractors, and employees of a contractor or subcontractor are indeed covered under the requirements of this part.

FRA notes that RSAC reached consensus on adding language that would require control center and ERCC personnel to receive initial and periodic training only on those portions of the railroad's e-prep plan that relate to their specific duties under the plan. However, FRA believes that adding this language could create safety concerns and therefore declines to propose adding such language to this paragraph in this NPRM. Specifically, FRA is concerned that if individuals receive only initial and periodic training on the very specific parts of the railroad's e-prep plan they are required to perform during an emergency situation, a railroad's entire emergency response could be hindered if specific individuals happen to be absent during an actual emergency situation. For example, if a specific control center or ERCC employee is required under the railroad's e-prep plan to notify internal railroad personnel during an emergency situation that an emergency situation on the railroad has occurred, and that employee is absent or incapacitated during an actual emergency, then

the railroad's emergency response may be hindered. By ensuring that control center and ERCC personnel receive broader initial and periodic training on appropriate courses of action on potential emergency situations beyond the individual's specific duties under the railroad's e-prep plan, these individuals will have a more holistic view of the railroad's emergency response and therefore be better prepared to respond to an emergency situation regardless of the specific circumstances.

FRA believes that training control center and ERCC personnel on the railroad's entire e-prep plan, not just the specific portions of the plan that relate to their specific duties, will not add any additional cost to the railroads because the railroads are already providing this broader level of training to their employees. Many railroads provide this holistic training on the railroad's e-prep plan through an informational video, which provides useful information to the employees on all levels of the railroad's emergency response.

FRA also proposes to amend paragraphs (a)(2)(ii)(A) through (D). In paragraph (a)(2)(ii)(A), FRA proposes to remove the word "dispatch" before "territory familiarization." The Task Force recommended that the word "dispatch" be removed from this subsection so that control center and ERCC personnel who are not railroad dispatchers would not be required to be as familiar with a territory as dispatchers are required to be under current railroad operating rules. For example, to conduct their duties efficiently and safely, railroad dispatchers are required to memorize the physical characteristics of the railroad territory over which they control train movements. While this is necessary for a railroad dispatcher, the Task Force believed, and FRA agrees, that this level of familiarity with railroad territory is not necessary for individuals working in a control center or ERCC

who are not railroad dispatchers.

Therefore, FRA proposes that the word "dispatch" be struck from paragraph (a)(2)(ii)(A). Individuals working in control centers or ERCCs who are not also railroad dispatchers would not be required to have complete dispatch territory familiarization in their capacity to assist in emergency situations. If the proposed language is adopted, railroads would not have to spend resources training all control center and ERCC personnel who are not railroad dispatchers to be as familiar with the railroad territory in question. Instead, for the purposes of this paragraph, territory familiarization would focus on, but not be limited to: access points for emergency responders along the railroad's right-of-way; special circumstances (e.g., tunnels); parallel operations; and other operating conditions (e.g., elevated structures, bridges, and electrified territory) including areas along the railroad's right-of-way that are remote and known to present challenges for emergency personnel responding to a passenger train emergency.

To complement the proposed language in paragraph (a)(2)(ii)(A), paragraph (a)(2)(ii)(B) would require initial and periodic training for control center and ERCC personnel on their ability to access and retrieve information that would aid emergency personnel in responding to an emergency situation. (Current paragraph (a)(2)(ii)(B) would be redesignated as proposed paragraph (a)(2)(ii)(C), below). Under the proposed regulation, control center and ERCC personnel would be required to receive sufficient training to be able to retrieve information to assist emergency personnel in their emergency response. For example, under a railroad's e-prep plan, a railroad employee designated as part of an ERCC might be required to be trained on how to electronically retrieve a map of railroad property,

read it properly, and identify and describe important points of access to emergency responders.

Language is also proposed to be added to paragraph (a)(2)(ii)(C) (redesignated from (a)(2)(ii)(B)). This new proposed language would require control center and ERCC personnel to receive initial and periodic training on the railroad's e-prep plan, including what protocols govern internal communications between these two groups when an actual emergency situation occurs. The language "as applicable under the plan," would also be added to the regulatory text to emphasize that due to the variety of possible organizational designs on how railroads handle emergency responses, it is ultimately each individual railroad's decision on what protocols will be followed to govern internal communication between control center and ERCC personnel.

Finally, a new paragraph (a)(2)(ii)(D) is proposed. This new paragraph reflects the Task Force's recommendation that initial and periodic e-prep plan training should include the protocols for establishing and maintaining external communications between the railroad's control center or ERCC, or both, and emergency responders. The Task Force recommended and FRA agrees that adding this requirement will ensure that control center and ERCC personnel receive initial and periodic training on what protocols need to be followed to establish and maintain communications with external organizations assisting in the emergency response. The Task Force and FRA believe that it is just as important for control center and ERCC personnel to learn the protocols for establishing and maintaining communications with external organizations as for the protocols governing internal communications between centers being proposed in paragraph (a)(2)(ii)(C).

FRA also realizes that if these proposed changes to part 239's emergency preparedness plan requirements are adopted, then railroads may have to amend their e-prep plans in order to be in compliance with the new requirements. Therefore, FRA intends to provide railroads sufficient time to have their amended e-prep plans submitted to FRA for review after the final rule making these changes is issued. FRA is considering lengthening the effective date of the final rule to do so, and invites comment on this issue.

Paragraph (a)(2)(iii). FRA is proposing to add language to paragraph (a)(2)(iii) that would require ERCC personnel to be included in the initial training after the e-prep plan is approved under § 239.201(b)(1). It is important that ERCC personnel be included in this training because, depending on the organizational structure of the railroad, the actions of ERCC personnel during an emergency response situation may be more pivotal to the successful implementation of the plan than the actions of control center personnel. Language is also proposed to be added to paragraph (a)(2)(iii) so that not only would control center and ERCC personnel who are employed by the railroad be covered by the regulation, but also control center and ERCC personnel who are railroad contractors and subcontractors as well as employees of these contractors and subcontractors. The proposed heading of this paragraph reflects this change as well.

Paragraph (a)(2)(iv). Similar to the proposed language in paragraph (a)(2)(iii), this NPRM proposes to add language to paragraph (a)(2)(iv) to ensure that ERCC personnel hired after the e-prep plan is approved by FRA receive initial training within 90 days after the individual's initial date of service with the railroad. Currently, this paragraph expressly requires that only on-board and control center personnel receive initial training within 90

days after their initial date of service with the railroad. Depending on how a railroad has chosen to organize its response to a specific emergency situation, failure to train a new ERCC employee within 90 days of starting his or her service on the railroad could create inefficiencies in the railroad's response to an emergency situation. Therefore, FRA proposes this modification to ensure that the railroads do not delay in providing training to new ERCC personnel.

In addition, FRA is also proposing to add language to paragraph (a)(2)(iv) clarifying that not only are railroad employees covered by the requirements of this paragraph, but also on-board, control center, and ERCC contractors, subcontractors, and employees of contractors or subcontractors. A change to the heading of paragraph (a)(2)(iv) is also being proposed to reflect the proposed modification of the regulatory text.

Paragraph (a)(2)(v). FRA is proposing to add language to this paragraph to clarify that railroads need to develop testing procedures not only for employees, but also for contractors and subcontractors, as well as employees of contractors and subcontractors who are being evaluated for qualification under the railroad's e-prep plan. The current regulatory text expressly requires railroads to develop testing procedures for railroad employees only. This proposed language, if adopted, would clarify that employees, as well as contractors, subcontractors, and employees of contractors and subcontractors, are required to be evaluated for qualification under the railroad's e-prep plan using appropriate testing procedures. Language is also being proposed to the heading of this paragraph to reflect the proposed change and to clarify that railroads need to develop testing procedures for ERCC personnel as well as on-board and control center personnel.

Finally, paragraph (a)(2)(v)(A) is proposed to be modified to require that testing procedures developed by the railroads accurately measure an individual's, rather than an individual employee's, knowledge of his or her responsibilities under the railroad's e-prep plan. Currently, paragraph (a)(2)(v)(A) expressly applies only to railroad employees, and this modification would ensure that railroad contractors and subcontractor are covered by the provision as well.

Paragraph (a)(8). Executive Order 13347 ("Individuals with Disabilities in Emergency Preparedness") requires the Federal government to appropriately support safety and security for individuals with disabilities in all types of emergency situations. 69 FR 44573 (July 26, 2004). Currently, each railroad subject to part 239 is required to provide for the safety of each of its passengers in its emergency preparedness planning. Nonetheless, FRA is proposing a new paragraph (a)(8) that would clarify that these railroads must include procedures in their e-prep plans addressing the safe evacuation of persons with disabilities during emergency situations (and full-scale simulations of them). FRA expects the railroads to address the responsibilities of on-board personnel to carry out these specific procedures. For example, if a train has a failure or is involved in an incident and an evacuation is deemed necessary, a crewmember in the body of the train would need to search for and identify those passengers who cannot reasonably be evacuated by stairs or steps.

This new paragraph would not require a railroad to maintain any list of train passengers, whether or not they have a disability. However, the railroad must have in place procedures so that the locations of persons with disabilities on board its trains are generally known to the train crew, and that such persons can be evacuated under all potential

conditions that require passenger evacuation, including those conditions identified under the Special Circumstances portion of the railroad's e-prep plan, when applicable, as required by paragraph (a)(4) of this section. In this regard, the railroad must address those situations requiring immediate passenger evacuation with or without the assistance of emergency response personnel or railroad personnel not on board its trains. At the same time, the railroad must have a process for notifying emergency response personnel in an emergency situation about the presence and general location of persons with disabilities when the railroad has knowledge that such passengers are on board a train.

Section 239.105 Debriefing and Critique.

This section requires railroads operating passenger train service to conduct debriefing and critique sessions after each passenger train emergency situation or full-scale emergency simulation to determine the effectiveness of the railroad's e-prep plan. FRA is proposing to add language to paragraph (c)(3) of this section so that the debriefing and critique session would be designed to determine whether the ERCC, as well as the control center, promptly initiated the required notifications. In addition, FRA makes clear that the plan's effectiveness in the evacuation of passengers with disabilities must be addressed during debrief and critique sessions.

Subpart C—Review, Approval, and Retention of Emergency Preparedness Plans

Section 239.201 Emergency Preparedness Plan; Filing and Approval.

Section 239.201 specifies the process for review and approval by FRA of each passenger railroad's e-prep plan. FRA is proposing to divide paragraph (a) of this section into paragraphs (a)(1) and (a)(2). As proposed, paragraph (a)(1) contains the regulatory

requirements on how to file an e-prep plan, while proposed paragraph (a)(2) contains the requirements on how to file an amendment to an FRA-approved plan. Proposed paragraph (a)(2) is then further subdivided. Proposed paragraph (a)(2)(i) describes what procedures a railroad must follow when filing amendments to its e-prep plan with FRA. Conversely, proposed paragraph (a)(2)(ii) lists the limited circumstances in which a railroad could enact an amendment to its approved e-prep plan without first getting FRA approval of the amendment. Finally, FRA is also proposing to add language to paragraph (b)(3) to clarify that FRA will not formally review the limited number of amendments that could be enacted without prior FRA approval as described in proposed paragraph (a)(2)(ii).

Specifically, FRA proposes a few small modifications to paragraph (a)(1). First, FRA is proposing to update the title of the FRA official who receives a railroad's e-prep plan, from Associate Administrator for Safety to Associate Administrator for Railroad Safety/Chief Safety Officer. Additionally, since the time part 239 was enacted, FRA's Office of Safety officially became the Office of Railroad Safety. Therefore, FRA proposes to update the language in proposed paragraph (a)(1) to reflect the name change of this FRA office. The RSAC also recommended modification of the time period new-start passenger railroads have to submit their e-prep plans to FRA before commencing passenger service. Currently, e-prep plans must be submitted by these passenger railroads no less than 45 days prior to commencing passenger operations. Consistent with this recommendation, FRA proposes that such railroads must submit their plans to FRA no less than 60 days prior to commencing passenger operations. This proposed change would provide FRA safety officials more time to review a railroad's e-prep plan, identify any safety concerns, and

notify the railroad of any such concerns so that changes to the plan could be made before actual passenger operations commence. FRA notes that the original filing deadline for passenger railroads in operation around the time part 239 went into effect was not more than 180 days after May 4, 1998. For those passenger railroads then in existence and for those passenger railroads that have started-up service since and have already filed and received approval on their plans, the rule would make clear that those plans are timely filed.

FRA also proposes to redesignate as paragraph (a)(2)(i) the regulatory requirement that all amendments to approved e-prep plans be filed with FRA 60 days prior to the effective date of the amendment. One exception to this requirement would be the limited number of e-prep plan amendments that can be enacted without FRA approval, listed in proposed paragraph (a)(2)(ii). These limited types of amendments to railroad e-prep plans would continue to be required to be filed with FRA, but they would become immediately effective and would not require FRA formal approval.

However, under proposed paragraph (a)(2)(i), e-prep plan amendments submitted to FRA that do not qualify for the exception in proposed paragraph (a)(2)(ii) must be submitted with a written summary of what the proposed amendment would change in the approved e-prep plan and, as applicable, a training plan describing how and when current and new employees and contractors would be trained on any amendment. For example, if the amendment would affect how current and new railroad employees and contractors assist emergency responders, then under this paragraph the railroad must also submit a training plan with the amendment stating how and when these employees and contractors would be trained on these changes to the railroad's e-prep plan. As another example, if the railroad

wants to identify new access roads to railroad property in its e-prep plan, then a training plan for employees and contractors should be included with the proposed amendment. Having the railroads include a summary with their proposed e-prep plan amendments that are not exempted by proposed paragraph (a)(2)(ii) is necessary because currently railroads have been submitting their entire approved e-prep plans with the amendment changes already incorporated in the plan without identifying to FRA what changes the railroad is specifically seeking to make to its approved e-prep plan. This has delayed FRA's ability to review the railroad's proposed amendment and respond to the railroad within 45 days as specified in paragraph (b)(3)(i). Requiring the railroads to include such summaries will help FRA efficiently review the proposed amendments and respond back to the railroad normally within 45 days; nevertheless, some reviews may take longer.

As previously stated, FRA is proposing a new paragraph (a)(2)(ii) under which qualifying amendments would not be subject to FRA's formal approval process as outlined in paragraph (b)(3)(i). Amendments that add or amend the name, title, address, or telephone number of the e-prep plan's primary contact person would qualify under paragraph (a)(2)(ii). Railroads filing amendments under this paragraph would be permitted to enact the amendment changes upon filing the amendment with FRA's Associate Administrator for Railroad Safety/Chief Safety Officer. Including a summary of the proposed changes caused by the amendment would not be required. All other e-prep plan amendments not covered by paragraph (a)(2)(ii) would be required to be filed in accordance with paragraph (a)(2)(i) and be subject to the formal approval process proposed in paragraph (b)(3)(i). FRA believes that paragraph (a)(2)(ii) is needed in order to limit the need for FRA to formally approve purely

administrative changes to previously approved railroad e-prep plans. This new paragraph will allow these specific types of amendments to become effective immediately upon filing with FRA and thereby help to streamline the approval process.

Additional language is also being proposed to paragraph (b)(3) in order to clarify that the limited types of amendments containing only administrative changes described in proposed paragraph (a)(2)(ii) would be exempt from the formal FRA review that is described in this paragraph.

Subpart D—Operational (Efficiency) Tests; Inspection of Records and Recordkeeping

Section 239.301 Operational (Efficiency) Tests and Inspections

Section 239.301 requires railroads to monitor the routine performance of their personnel who have individual responsibilities under the e-prep plan to verify that they can perform the duties required under the plan in a safe and effective manner. FRA is proposing to modify this section in several ways. First, FRA is proposing to add headings to each main paragraph for clarity. Second, FRA proposes to add language to paragraph (a) that clarifies that railroads are required to specify in their e-prep plans the specific intervals they will periodically conduct operational (efficiency) tests and inspections for individuals with responsibilities under the e-prep plans. Additionally, FRA is proposing to add language to paragraph (a) that will require any ERCC personnel, railroad contractors or subcontractors, or employees of railroad contractors or subcontractors, to be subject to operational (efficiency) tests and inspections. Finally, FRA is proposing to add new paragraphs (a)(1), (a)(1)(i) through (vi), (a)(2), (d), and (e). The specific requirements proposed in each new paragraph are discussed below.

In paragraph (a), FRA is proposing to add the heading, "Requirement to conduct operational (efficiency) tests and inspections." FRA believes that this heading will help the regulated community identify that paragraph (a) of this section specifically addresses operational (efficiency) test and inspection requirements. Additionally, FRA is proposing to add language to paragraph (a) that will require ERCC personnel, railroad contractors or subcontractors, as well as employees of railroad contractors to be subject to the same periodic operational (efficiency) tests and inspections as on-board and control center employees are under the current regulation. Adding this language to the regulation is necessary to ensure that all individuals who assist in the railroad's emergency response are subject to operational (efficiency) tests and inspections. This proposed language is intended to help ensure that railroads are prepared to provide an appropriate response in the event of an emergency situation. FRA is also proposing in paragraph (a)(1) to identify basic elements that must be included in the railroad's written program of operational (efficiency) tests and inspections.

FRA proposes six new paragraphs under paragraph (a)(1). Each new paragraph includes a required element that must be addressed in every railroad's written program of operational (efficiency) tests and inspections. RSAC recommended that FRA adopt these requirements, which were modeled from regulations found in 49 CFR 217.9, Program of operational tests and inspections; recordkeeping. In fact, in several instances, language was directly taken from various provisions of § 217.9—specifically, § 217.9(c)(3) through (5). While part 217 prescribes processes for railroad operating employees only (e.g., train and engine crews), its approach to operational tests and inspections is useful for governing

individuals covered by FRA's emergency preparedness requirements in part 239. However, as proposed, not just railroad operating employees but all on-board, control center, and ERCC employees, as well as contractors and sub-contractors in these roles, would be subject to these tests and inspections as applicable under the railroad's e-prep plan. Each of the new proposed paragraphs is discussed below.

For clarification, FRA notes that part 239 operational (efficiency) tests and inspections can also qualify as operational tests under § 217.9 if the employee, contractor or subcontractor being tested is also performing functions that are covered by part 217. Likewise, operational tests conducted under part 217 can also be accredited as operational (efficiency) tests under part 239 as long as the criteria for operational (efficiency) tests and inspections in part 239 are met. For example, passenger train conductors are subject to operational (efficiency) testing under both parts 217 and 239. An operational (efficiency) test of a passenger train conductor that involves the procedures for passenger train emergency preparedness would satisfy requirements under both parts 217 and 239. In contrast, an operational (efficiency) test of a passenger train conductor that involves the procedures for operating derails would satisfy the requirements under part 217 only.

Operational (efficiency) testing under part 239 can be conducted as part of a railroad's efficiency testing program under § 217.9 or in an entirely separate program. However, if adopted, the proposed operational (efficiency) test and inspections requirements for part 239 will have a broader applicability than just to the employees covered by § 217.9, as noted above. For example, these proposed requirements would also cover such individuals as passenger car attendants and ERCC employees, who would not be covered

under part 217. Therefore, a railroad that would prefer to conduct its operational (efficiency) testing required by part 239 as part of its efficiency testing program under § 217.9 would need to modify its program to ensure that the additional tests are included and conducted for all of the employees required to be covered under part 239.

As proposed, paragraph (a)(1)(i) will require railroads to provide in their e-prep plans a program of operational (efficiency) tests and inspections for railroad employees, railroad contractors or subcontractors, and employees of railroad contractors and subcontractors addressing the appropriate courses of action in response to various potential emergency situations and the responsibilities for these individuals under the railroad's e-prep plan. For example, they should address how railroad personnel on board a train respond in case a fire occurs. They should also address what each on-board employee's, contractor's, or subcontractor's individual responsibilities are during such an emergency situation. FRA believes that these proposed requirements would help to reduce confusion during an actual emergency situation and ensure that the railroad's on-board staff undergo operational (efficiency) tests and inspections on actions they would be performing during an emergency event. Only railroad employees, railroad contractor and subcontractors, and employees of railroad contractors and subcontractors who are covered by or have responsibilities under the railroad's e-prep plan would be subject to operational (efficiency) tests and inspections from the railroad. Hired or contracted employees working for the railroad who do not have any responsibilities under the railroad's e-prep plan would not have to be subject to operational (efficiency) tests and inspections.

Paragraph (a)(1)(ii) proposes that the railroads describe each type of operational

(efficiency) test and inspection required for passenger train emergency preparedness. The description must also specify the means and procedures used to carry out these operational (efficiency) tests and inspections. For example, an operational (efficiency) test intended for an on-board employee may be conducted as a challenge question posed by a supervisor. In this example, the supervisor may ask the employee what his or her responsibilities are for the evacuation of passengers, including passengers with disabilities, in specific circumstances such as a passenger car filling with smoke. In another instance, a supervisor may ask an ERCC employee to identify a special circumstance (e.g., a tunnel or bridge) located in his or her territory and demonstrate how the employee would direct emergency responders to the location during an actual emergency. Overall, operational (efficiency) tests and inspections adopted for passenger train emergency preparedness should cover all affected employees and be comprehensive.

Proposed paragraph (a)(1)(iii) will require the railroads to state in their e-prep plans the purpose of each type of operational (efficiency) test and inspection conducted. For example, an operational (efficiency) test intended for on-board employees may be conducted to determine if the employees are familiar with passenger evacuation procedures. As another example, such tests intended for ERCC employees may be conducted to determine if the ERCC employees are familiar with special circumstances on their territory and if they know how to direct emergency responders to these locations. In particular, conducting operational (efficiency) tests on ERCC employees to determine their knowledge of the railroad's e-prep plan, special circumstances, and access points would be necessary to ensure that they are familiar with emergency procedures and capable of directing emergency

responders to a passenger train in the event of an emergency.

FRA is also proposing to add new paragraph (a)(1)(iv), which will clarify that each railroad must specify in its operational testing program the specific intervals at which it will periodically conduct operational (efficiency) tests and inspections for individuals covered by paragraph (a). This information should be listed according to operating division where applicable. FRA believes that this additional language is necessary after reviewing e-prep plans submitted by various railroads to FRA. In reviewing railroad e-prep plans, FRA discovered that some railroads would simply state in their plans that they would periodically conduct operational (efficiency) tests and inspections without specifying by what specific interval these tests or inspections would be administered. In some instances, railroads simply copied the language directly from § 239.301(a) and placed it into their e-prep plans.

By adding this proposed language, FRA is not mandating any specific interval by which the railroad should conduct these tests and inspections. FRA believes that the regulated community should have the flexibility to decide when individuals covered by paragraph (a) should be periodically subject to these tests and inspections based on the individual circumstances of each railroad and its e-prep plan and operational testing program. The proposed language will not affect the railroad's current ability to determine how often these periodic tests and inspections should occur. However, FRA will require the railroad to provide more information to the agency so that FRA can better verify that these types of tests and inspections are in fact occurring as planned, and that the railroads are properly carrying out their responsibilities in preparing to deal with various emergency situations.

Proposed paragraph (a)(1)(v) will require the railroad to identify in its e-prep plan each officer by name, job title, and division or system, who is responsible for ensuring that the program of operational (efficiency) tests and inspections is properly implemented. Therefore, for each railroad division or system there should be a separate contact person listed within the e-prep plan who is responsible for implementing the details of the plan on that specific division or system during an emergency situation. In addition, for railroads that have multiple divisions, the proposed regulation would require the railroad to identify at least one officer at the railroad's system headquarters who is responsible for overseeing the entire railroad's program and the e-prep plan implementation. This individual should be knowledgeable about the current state of the railroad's operational (efficiency) test and inspection requirements as well as the current state of the railroad's e-prep program system-wide.

The final proposal, in paragraph (a)(1)(vi), would require that railroad officers conducting operational (efficiency) tests and inspections be trained on the elements of the railroad's e-prep plan that are relevant to the tests and inspections that the officers will be conducting. In addition, the railroad officers conducting the operational (efficiency) tests and inspections must be qualified on the procedures for administering such tests and inspections in accordance with the railroads written program.

FRA also proposes to add headings to both paragraphs (b) and (c) of this section. FRA believes that adding the heading "Keeping records of operational (efficiency) test and inspection records" to paragraph (b) will help clarify that paragraph (b) addresses what types of written records need to be created and retained after the performance of an operational

(efficiency) test or inspection. Similarly, the heading "Retention of operational (efficiency) test and inspection records" is proposed to be added to paragraph (c). This proposed heading will clarify that paragraph (c) addresses the requirements for how long records of operational (efficiency) tests and inspections need to be retained by the railroad. FRA believes that these proposed headings will be useful guides for the regulated community, especially those who are unfamiliar with part 239 and its requirements.

Proposed paragraph (d) contains a new requirement that each railroad retain one copy of its current operational (efficiency) testing and inspection program required by paragraph (a) of this section and each subsequent amendment to the program. If this proposed requirement is adopted, railroads will be required to retain a copy of the current program and any subsequent amendment to the program at the railroad's system headquarters and at each divisional headquarters for three calendar years after the end of the calendar year to which the program relates. The records must also be made available for inspection and copying during normal business hours by representatives of FRA and States participating under 49 CFR part 212.

Finally, FRA is proposing to add a new paragraph (e) to this section. As recommended by RSAC, this proposed paragraph will require each railroad subject to this part to retain a written annual summary of the number, type and result of each operational (efficiency) test and inspection that was conducted in the previous year as required by paragraph (a) of this section. When applicable, these summaries describing the railroad's operational (efficiency) tests and inspections would be required to be organized by operating division. These summaries are intended to provide FRA with a clearer understanding of

how operational (efficiency) tests and inspections are being applied and how successful these programs are over different railroad divisions. Annual summaries would be required to be completed and in the possession of the railroad's division and system headquarters by March 1 of the year following the year covered by the summary.

In addition, the annual summary will be required to be retained by the railroad for three calendar years after the end of the calendar year covered by the summary. For example, a railroad's 2013 annual summary of operational (efficiency) tests and inspections would be required to be retained through calendar year 2016. Annual summaries would be required to be made available for inspection and copying during normal business hours by representatives of FRA and States participating under 49 CFR part 212.

FRA specifically invites comment on the appropriateness of proposed paragraph (e). Given that the intended purpose of the proposal is to provide FRA with a clear understanding of how operational (efficiency) tests and inspections are being applied and how successful these programs are being implemented from a systems perspective, FRA invites comment whether the periodic review and analysis requirements of § 217.9(e) should be adopted in the final rule to more appropriately fulfill the intended purpose. Indeed, under § 217.9(e), railroads should already be reviewing and analyzing operational (efficiency) test and inspection data conducted for passenger train emergency preparedness on individuals subject to part 217; the requirements of the paragraph could then be broadened to cover individuals subject to part 239. FRA also believes that a railroad could consolidate such a review and analysis required by part 239 with one required under § 217.9(e), and that they could be retained for a period of one year after the end of the calendar year to which they

relate and be made available to representatives of FRA and States participating under 49 CFR part 212.

IV. Regulatory Impact and Notices

A. Executive Order 12866s and 13563 and DOT Regulatory Policies and Procedures

This proposed rule has been evaluated in accordance with existing policies and procedures under both Executive Orders 12866 and 13563 and DOT policies and procedures. See 44 FR 11034; February 26, 1979. FRA has prepared and placed in the docket (FRA-2011-0062, Notice No. 1) a regulatory impact analysis addressing the economic impact of this proposed rule.

As part of the regulatory impact analysis, FRA has assessed quantitative measurements of the cost streams expected to result from the implementation of this proposed rule. For the 10-year period analyzed, the estimated quantified cost that would be imposed on industry totals $1,049,308 with a present value (PV, 7 percent) of $734,922. The largest burdens that would be expected to be imposed are from the new requirements related to the operational (efficiency) tests in § 239.301 of the proposed regulation. The table below presents the estimated discounted costs associated with the proposed rulemaking.

10-Year Estimated Costs of Proposed Rule	
	Present Value (7-percent)
Emergency Preparedness Plan (§ 239.101)	$ 219,833

Debriefing and Critique (§ 239.105)	$ 200,273
Emergency Preparedness Plan; Filing and Approval (§ 239.201)	$ 12,006
Operational (efficiency) Tests (§ 239.301)	$ 302,810
TOTAL COSTS	**$ 734,922**

As part of the regulatory impact analysis, FRA has explained what the likely benefits for this proposed rule would be, and provided numerical assessments of the potential value of such benefits. The proposed regulation would generate safety benefits by preventing injuries in passenger rail accidents from becoming more severe. FRA uses the Abbreviated Injury Scale (AIS) as a measure of the severity for injuries with an AIS 1 injury being defined as minor and an AIS 5 as the most severe, i.e., critical.[1] As noted in Appendix A of the regulatory impact analysis an AIS 1 would be an injury that is minor and may not require professional medical treatment. An AIS 2 injury would be an injury that always requires treatment but is not ordinarily life-threatening. Benefits would accrue from the increased likelihood that the passenger railroads would handle external communications more efficiently, expediting the arrival of emergency responders to accident scenes, and from the ability of the railroad personnel to minimize health and safety risks through improved internal and external communications.. This proposed regulation would allow for more

[1] Association for the Advancement of Automotive Medicine. http://www.aaam1.org/ais/#

flexibility in passenger train emergency preparedness planning and implementation and provides for necessary emergency preparedness training.

Additionally, the NPRM would allow passenger railroads to adjust to future personnel reorganizations and to incorporate technological innovations by affording the railroad's management flexibility in determining which part of the organization to designate as the ERCC.

Given the nature of the proposed regulatory change, FRA believes that the ideal methodology to estimate the safety benefits is a break-even analysis. A break-even analysis quantifies what minimum safety benefits are necessary for the proposed rule to be cost-effective, considering the estimated quantified costs. For this proposed rule, this analysis estimates that the break-even point is met when 3.84 injuries are prevented from increasing in severity from AIS 1 to AIS 2.

The table below presents the estimated benefits necessary for this proposed rule to break-even with the estimated costs. For the 10-year period analyzed the safety benefits would total $1,049,308 with a present value (PV, 7 percent) of $735,757.

10-Year Estimated Benefits of Proposed Rule		
	Limitation of Injury Severity	Monetary Benefits
Break-even point (not discounted)	3.84 less severe injuries	$1,049,308
Discounted Benefits (PV 7 percent)	3.84 less severe injuries	$735,757

The benefits for this proposed rule would exceed the estimated costs when 4 injuries

are prevented from increasing in severity from an AIS 1 to an AIS 2. FRA believes the proposed changes in this rulemaking will more than exceed the break-even estimate.

B. Regulatory Flexibility Act and Executive Order 13272; Initial Regulatory Flexibility Assessment

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) and Executive Order 13272 (67 FR 53461; August 16, 2002) require agency review of proposed and final rules to assess their impact on small entities. An agency must prepare an initial regulatory flexibility analysis (IRFA) unless it can determine and certify that a rule, if promulgated, would not have a significant impact on a substantial number of small entities. FRA has not determined whether this proposed rule would have a significant impact on a substantial number of small entities. Therefore, FRA is publishing this IRFA to aid the public in commenting on the potential small business impacts of the requirements in this NPRM. FRA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from adoption of the proposals in this NPRM. FRA will consider all comments received in the public comment process when making a final determination.

The proposed rule would apply to all passenger railroads (commuter and intercity) and railroads that host passenger rail operations. Based on information currently available, FRA estimates that less than 2 percent of the total costs associated with implementing the proposed rule would be borne by small entities. Based on very conservative assumptions, FRA estimates that the total non-discounted cost for the proposed rule would be approximately $1 million for the railroad industry. There are two passenger railroads that

would be considered small for purposes of this analysis and together they comprise less than 5 percent of the railroads impacted directly by this proposed regulation. Both of these railroads would have to make some investment to meet the proposed requirements. Thus, a substantial number of small entities in this sector may be impacted by this proposed rule. These small railroads carry out smaller operations than the average passenger railroad, allowing them to meet the proposed requirements at lower overall costs. Thus, although a substantial number of small entities in this sector would likely be impacted, the economic impact on them would likely not be significant.

In order to get a better understanding of the total costs for the railroad industry, which forms the basis for the estimates in this IRFA, or more cost detail on any specific requirement, please see the Regulatory Impact Analysis (RIA) that FRA has placed in the docket for this rulemaking.

In accordance with the Regulatory Flexibility Act, an IRFA must contain:

- A description of the reasons why the action by the agency is being considered.
- A succinct statement of the objectives of, and legal basis for, the proposed rule.
- A description—and, where feasible, an estimate of the number—of small entities to which the proposed rule would apply.
- A description of the projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that would be subject to the requirements and the types of professional skills necessary for preparation of the report or record.
- An identification, to the extent practicable, of all relevant Federal rules that may

duplicate, overlap, or conflict with the proposed rule.

1. Reasons for Considering Agency Action

FRA initiated this rulemaking through RSAC in part upon learning that in the regulated community there was some confusion regarding existing requirements on passenger train emergency preparedness (49 CFR part 239). As a result, the General Passenger Safety Task Force (Task Force), a subgroup of the RSAC, was tasked to resolve these issues. The Task Force found that as currently written, part 239 expressly requires only the railroad's control center employees to be subject to training and operational (efficiency) tests and inspections. However, in many instances, control center employees were not found to be the primary points of contact for emergency first responders during a passenger train emergency. Instead, they were carrying out other important duties, such as providing block protection and diverting trains to other parts of the railroad's network. The proposed language in this NPRM would ensure that all personnel involved in emergency preparedness under part 239 are subject to appropriate training as well as operational (efficiency) tests and inspections. At the same time, the NPRM would relieve personnel not involved in emergency preparedness from such requirements. While, the proposed regulation differs slightly from the consensus language, the need for this NPRM is backed by the RSAC and would improve passenger train emergency preparedness by clarifying training and testing requirements.

In addition, as a result of FRA's experience in the periodic review and approval of passenger railroads' e-prep plans, FRA realized that a number of the changes submitted were purely administrative in nature. While part 239 currently subjects all changes to an e-

prep plan to a formal review and approval process, FRA believes that purely administrative changes should be excluded from the formal approval process so that the agency can focus its resources on more substantive matters. Accordingly, this NPRM would streamline the approval of e-prep plans.

Further, Executive Order 13347 ("Individuals with Disabilities in Emergency Preparedness") requires the Federal government to appropriately support safety and security for individuals with disabilities in all types of emergency situations. 69 FR 44573; July 26, 2004. Currently, each railroad subject to part 239 is required to provide for the safety of each of its passengers in its emergency preparedness planning. Nonetheless, FRA is proposing to clarify that these railroads must include procedures in their e-prep plans addressing the safe evacuation of persons with disabilities during emergency situations (and full-scale simulations of them).

2. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The purpose of this rulemaking is to further Federal safety standards on passenger train emergency preparedness currently in place in part 239. As a result of the proposed regulation, passenger railroads would have more flexibility to carry out the requirements of part 239 and keep their plans current. The NPRM would permit multiple parts of the organization to be involved in the emergency preparedness process to maintain resiliency while helping to clarify the role of various parts of the structure in an emergency situation. Additionally, the NPRM would provide flexibility to adjust to future personnel reorganizations and to incorporate technological innovations by allowing the railroad's management to determine what part of the organization is designated to be the ERCC.

Among FRA's reasons for initiating this rulemaking was that some confusion arose regarding certain requirements of FRA's passenger train emergency preparedness regulations. For example, FRA learned that some passenger railroads were confused as to which types of railroad personnel were required to be trained or be subjected to operational (efficiency) testing and inspections under part 239. These railroads were unclear whether part 239 required certain railroad personnel who directly coordinate with emergency responders and other outside organizations during emergency situations to be trained or be subjected to operational (efficiency) testing and inspections. As a result, FRA believes that it is necessary to clarify the regulatory language in part 239 to ensure that railroad personnel who directly coordinate with emergency responders actually receive the proper training and are subject to operational (efficiency) testing and inspections. FRA also learned that many railroads were unclear whether operational (efficiency) testing under part 239 could be considered for purposes of the railroad's efficiency testing program required under 49 CFR part 217.

Finally, FRA believed it was necessary to clarify part 239 to address the requirements of Executive Order 13347. Executive Order 13347 requires, among other things, that Federal agencies encourage State, local, and tribal governments, private organizations, and individuals to consider in their emergency preparedness planning the unique needs of individuals with disabilities whom they serve. While under part 239 the unique needs of passengers with disabilities must already be considered in the railroads' e-prep plans, the NPRM would clarify the railroads' responsibilities.

In order to further FRA's ability to respond effectively to contemporary safety

problems and hazards as they arise in the railroad industry, Congress enacted the Federal Railroad Safety Act of 1970 (Safety Act) (formerly 45 U.S.C. 421, 431 et seq., now found primarily in chapter 201 of title 49). (Until July 5, 1994, the Federal railroad safety statutes existed as separate acts found primarily in title 45 of the United States Code. On that date, all of the acts were repealed, and their provisions were recodified into title 49 of the United States Code.) The Safety Act grants the Secretary of Transportation rulemaking authority over all areas of railroad safety (49 U.S.C. 20103(a)) and confers all powers necessary to detect and penalize violations of any rail safety law. This authority was subsequently delegated to the FRA Administrator (49 CFR 1.49). Accordingly, FRA is using this authority to initiate a rulemaking that would clarify and revise FRA's regulations for passenger train emergency preparedness. These standards are codified in Part 239, which was originally issued in May 1999 as part of FRA's implementation of rail passenger safety regulations required by Section 215 of the Federal Railroad Safety Authorization Act of 1994, Pub. L. No. 103-440, 108 Stat. 4619, 4623-4624 (November 2, 1994). Section 215 of this Act has been codified at 49 U.S.C. 20133.

3. A Description of, and Where Feasible, an Estimate of Small Entities to Which the Proposed Rule Would Apply

The "universe" of the entities to be considered generally includes only those small entities that are reasonably expected to be directly regulated by this action. This proposed rule would directly affect commuter and intercity passenger railroads, and freight railroads hosting passenger rail operations.

"Small entity" is defined in 5 U.S.C. 601. Section 601(3) defines a "small entity" as having the same meaning as "small business concern" under Section 3 of the Small Business

Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) likewise includes within the definition of "small entities" not-for-profit enterprises that are independently owned and operated, and are not dominant in their field of operation. The U.S. Small Business Administration (SBA) stipulates in its size standards that the largest a railroad business firm that is "for profit" may be and still be classified as a "small entity" is 1,500 employees for "Line Haul Operating Railroads" and 500 employees for "Switching and Terminal Establishments." Additionally, 5 U.S.C. 601(5) defines as "small entities" governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to that authority FRA has published a final statement of agency policy that formally establishes "small entities" or "small businesses" as being railroads, contractors and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1-1, which is $20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. See 68 FR 24891, May 9, 2003, codified at appendix C to 49 CFR part 209. The $20-million limit is based on the Surface Transportation Board's revenue threshold for a Class III railroad. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1-1. FRA is proposing to use this definition for this rulemaking. Any comments received pertinent to its use will be addressed in the final rule.

Railroads

There are only two intercity passenger railroads, Amtrak and the Alaska Railroad. Neither can be considered a small entity. Amtrak is a Class I railroad and the Alaska Railroad is a Class II railroad. The Alaska Railroad is owned by the State of Alaska, which has a population well in excess of 50,000.

There are 28 commuter or other short-haul passenger railroad operations in the U.S. Most of these railroads are part of larger transit organizations that receive Federal funds and serve major metropolitan areas with populations greater than 50,000. However, two of these railroads do not fall in this category and are considered small entities. The impact of the proposed regulation on these two railroads is discussed in the following section.

4. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Class of Small Entities That Will Be Subject to the Requirements and the Type of Professional Skill Necessary for Preparation of the Report or Record

For a thorough presentation of cost estimates, please refer to the RIA, which has been placed in the docket for this rulemaking. FRA also notes that this proposed rule was developed in consultation with an RSAC working group and task force that included representatives from the Association of American Railroads, freight railroads, Amtrak, and individual commuter railroads.

FRA is aware of two passenger railroads that qualify as small entities: Saratoga & North Creek Railway (SNC), and the Hawkeye Express, which is operated by the Iowa Northern Railway Company (IANR). All other passenger railroad operations in the United States are part of larger governmental entities whose service jurisdictions exceed 50,000 in population.

In 2010 Hawkeye Express transported approximately 5,000 passengers per game over a 7-mile round-trip distance to and from University of Iowa (University) football games. IANR has approximately 100 employees and is primarily a freight operation totaling 184,385 freight train miles in 2010. The service is on a contractual arrangement with the University, a State of Iowa institution. (The population of Iowa City, Iowa is approximately 69,000.) Iowa Northern, which is a Class III railroad, owns and operates the 6 bi-level passenger cars used for this passenger operation which runs on average 7 days over a calendar year. FRA expects that any costs imposed on the railroad by this regulation will likely be passed on to the University as part of the transportation cost, and requests comment on this assumption.

The SNC began operation in the summer of 2011 and currently provides daily rail service over a 57-mile line between Saratoga Springs and North Creek, New York. The SNC, a Class III railroad, is a limited liability company, wholly owned by San Luis & Rio Grande Railroad (SLRG). SLRG is a Class III rail carrier and a subsidiary of Permian Basin Railways, Inc. (Permian), which in turn is owned by Iowa Pacific Holdings, LLC (IPH). The SNC primarily transports visitors to Saratoga Springs, tourists seeking to sightsee along the Hudson River, and travelers connecting to and from Amtrak service. The railroad operates year round, with standard coach passenger trains. Additional service activity includes seasonal ski trains, and specials such as "Thomas The Train." This railroad operates under a five-year contract with the local government, and is restarting freight operations as well. The railroad has about 25 employees.

FRA believes that these two entities would not be impacted significantly. While,

each of these entities would most likely have to file a new e-prep plan, FRA does not expect they would have to change how each railroad reacts to an emergency situation due to including ERCCs under part 239's requirements. Their operating structure is small and it is probable that employees with e-prep duties would continue to have the same emergency responsibilities. FRA expects that both railroads would see additional burden from inclusion of other provisions of the proposed regulation related to recordkeeping, and other training and testing requirements. This NPRM would not be a significant financial impact on these railroad and their operations. They could expect the total regulatory costs for this proposed rule, if it is adopted, to be less than $6,500 for each of the railroads over the next 10 years. The Hawkeye Express and the SNC currently have e-prep plans that have been reviewed and approved by the FRA. Although this NPRM would change several requirements in part 239, professional skills necessary for compliance with existing and new requirements would be the same. FRA believes that both entities have the professional knowledge to fulfill the requirements in the proposed rulemaking.

In conclusion, FRA believes that there are two small entities and that both could be impacted. Thus, a substantial number of small entities could be impacted by the proposed regulation. However, FRA has found that these entities that are directly burdened by the regulation would not be impacted significantly. FRA believes that the costs associated with the proposed rule are reasonable and would not cause any significant financial impact on their operations.

Market and Competition Considerations

The small railroad segment of the passenger railroad industry essentially faces no

intra-modal competition. The two railroads under consideration would only be competing with individual automobile traffic and serve in large part as a service offering to get drivers out of their automobiles and off congested roadways. One of the two entities provides service at a sporting event to assist attendees to travel to the stadium from distant parking areas. The other entity provides passenger train service to tourist and other destinations. FRA is not aware of any bus service that currently exists that directly competes with either of these railroads. FRA requests comments and input on current or planned future existence of any such service or competition.

The railroad industry has several significant barriers to entry, such as the need to own the right-of-way and the high capital expenditure needed to purchase a fleet, track, and equipment. As such, small railroads usually have monopolies over the small and segmented markets in which they operate. Thus, while this rule may have an economic impact on all passenger railroads, it should not have an impact on the intra-modal competitive position of small railroads.

5. An Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

FRA is aware that some railroads are unclear whether operational (efficiency) testing under part 239 could be considered for purposes of the railroad's efficiency testing program required under 49 CFR part 217. In the NPRM, FRA clarifies that part 239 operational (efficiency) tests and inspections can also qualify as operational tests under § 217.9 if the employee, contractor, or subcontractor being tested is also performing functions that are covered by part 217. Likewise, operational tests conducted under part 217 can also be accredited as operational (efficiency) tests under part 239 as long as the criteria for

operational (efficiency) tests and inspections in part 239 are met.

FRA invites all interested parties to submit data and information regarding the potential economic impact that would result from adoption of the proposals in this NPRM. FRA will consider all comments received in the public comment process when making a determination.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule are being submitted for approval to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). The sections that contain the current and new or revised information collection requirements and the estimated time to fulfill each requirement is as follows:

CFR Section	Respondent Universe	Total Annual Responses	Average Time Per Response	Total Annual Burden Hours
239.13 – Waiver Petitions (Current requirement)	45 railroads	1 petition	20 hours	20 hours
239.107 – Marking of Emergency Exits (Current requirements)				
-- Marking of windows and door exits intended for emergency egress	45 railroads	4,575 decals 1,950 decals	10 minutes/ 5 minutes	706 hours
-- Marking of window and door exit intended for emergency access by emergency responders	45 railroads	6,320 decals 1,300 decals	5 minutes/ 10 minutes	744 hours
-- Records of inspection, maintenance, and repair	45 railroads	1,800 tests/ records + 1,200 tests/ records	20 minutes	1,000 hours

239.101/201/203 – Emergency Preparedness Plans (Revised requirements)				
-- 1st Year – Amended plans	45 railroads	45 plans	20.33 hours	915 hours
-- Subsequent years -- amended plans – substantive changes	45 railroads	9 plans	20.33 hours	183 hours
-- Subsequent years -- amended plans – non-substantive changes	45 railroads	4 plans	60 minutes	4 hours
-- New RRs – e-prep plans	2 railroads	2 plans	80 hours	160 hours
-- Current employee initial training for train crews, control center & emergency response communications members	45 railroads	540 trained Employees	60 minutes	540 hours
-- Employee periodic training	45 railroads	27 trained employees	4 hours	108 hours
--Initial training of New Employees	45 railroads	110 trained employees	60 minutes	110 hours
239.101(a)(1)(ii) 3 – Designation of RR employee to maintain current emergency telephone numbers to notify outside responders, etc. (Current requirement)	45 railroads	45 designations	5 minutes	4 hours
239.101(a)(1)(ii) 3 – Railroads' list/record of emergency telephone numbers to notify outside responders, etc. (Current requirement)	45 railroads	2 updated Lists	1 hour	2 hours
239.101(a)(3) – Emergency Preparedness Plan – Joint Operation (Current requirement)	45 railroads	1 plan	16 hours	16 hours
239.101(a)(5) – RR Training Program for on-line emergency responders (Current requirement)	45 railroads	45 updated plans	40 hours	1,800 hours
239.101(a)(7) – Passenger Safety Information – Posting emergency instructions inside all passenger cars (Current requirement)	2 new railroads	1,300 cards/ 2 programs/ 2 safety messages + 2 programs/ 2 safety messages	5 minutes/ 16 hours/ 48 hours/ 8 hours/ 24 hours	300 hours
239.105(a)(3) – Debriefing and Critique – Sessions conducted after passenger emergency situation or full scale simulation (Current requirement)	45 railroads	79 sessions	27 hours	2,133 hours

239.301(a) –Operational Efficiency Tests (Current requirements) – RR Tests/inspections of on-board, control center, and emergency response communications center employees	45 railroads	25,000 tests/ Inspections	15 minutes	6,250 hours
(b)(c)—Records of operational (efficiency) tests/inspections	45 railroads	25,000 records	2 minutes	833 hours
(d) –Records of written program of operational (efficiency) tests (New Requirement)	45 railroads	90 records	3 minutes	5 hours
(e) Annual summary of operational (efficiency) test/inspections and copy of written summary at system and division headquarters	45 railroads	45 annual summaries + 30 copies	5 minutes + 1 minute	5 hours

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Office of Railroad Safety, Information Clearance Officer, at 202-493-6292, or Ms. Kimberly Toone, Office of Information Technology, at 202-493-6139.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Kimberly Toone, Federal Railroad Administration, 1200 New Jersey Avenue, S.E., 3rd Floor, Washington,

D.C. 20590. Comments may also be submitted via e-mail to Mr. Brogan or Ms. Toone at the following address: Robert.Brogan@dot.gov; Kimberly.Toone@dot.gov

OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the Federal Register.

D. Federalism Implications

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, the agency may

not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. This proposed rule will not have a substantial effect on the States or their political subdivisions, and it will not affect the relationships between the Federal government and the States or their political subdivisions, or the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that this regulatory action will not impose substantial direct compliance costs on the States or their political subdivisions. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

However, this proposed rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the

State law, regulation, or order qualifies under the "essentially local safety or security hazard" exception to section 20106.

In sum, FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this proposed rule is not required.

E. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96-39, 19 U.S.C. 2501 et seq.) prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

FRA has assessed the potential effect of this rulemaking on foreign commerce and believes that its requirements are consistent with the Trade Agreements Act. The requirements are safety standards, which, as noted, are not considered unnecessary obstacles to trade. Moreover, FRA has sought, to the extent practicable, to state the requirements in terms of the performance desired, rather than in more narrow terms restricted to a particular design or system.

F. Environmental Impact

FRA has evaluated this rule in accordance with its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by

the National Environmental Policy Act (42 U.S.C. 4321 et seq.), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this proposed rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. See 64 FR 28547 (May 26, 1999).

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this proposed rule is not a major Federal action significantly affecting the quality of the human environment.

G. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was

published, the agency shall prepare a written statement" detailing the effect on State, local, and tribal governments and the private sector. This proposed rule will not result in the expenditure, in the aggregate, of $100,000,000 or more (as adjusted annually for inflation) in any one year, and thus preparation of such a statement is not required.

H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." See 66 FR 28355, May 22, 2001. Under the Executive Order, a "significant energy action" is defined as any action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) that is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

FRA has evaluated this proposed rule in accordance with Executive Order 13211. FRA has determined that this proposed rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a "significant energy action" within the meaning of the Executive Order.

I. Privacy Act

FRA wishes to inform all potential commenters that anyone is able to search the

electronic form of all comments received into any agency docket by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). Please visit http://www.regulations.gov/#!privacyNotice. You may also review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477-78) or you may visit http://www.dot.gov/privacy.html .

List of Subjects in 49 CFR Part 239

Passenger train emergency preparedness, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend part 239 of chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

PART 239—[AMENDED]

Subpart A—General

§ 239.5 [Removed and Reserved]

1. Section 239.5 is removed and reserved.

2. Section 239.7 is amended by adding the definition of "Emergency response communications center" to read as follows:

§ 239.7 Definitions.

* * * * *

Emergency response communications center means a central location designated by a railroad with responsibility for establishing, coordinating, or maintaining communication

with emergency responders, representatives of adjacent modes of transportation, and appropriate railroad officials during a passenger train emergency. The emergency response communications center may be part of the control center.

* * * * *

Subpart B—Specific Requirements

3. Section 239.101 is amended by revising paragraphs (a)(1)(ii) and (a)(2)(ii), (a)(2)(iii) introductory text, (a)(2)(iv), (a)(2)(v) introductory text, and (a)(2)(v)(A), and by adding paragraph (a)(8) to read as follows:

§ 239.101 Emergency preparedness plan.

(a) * * *

(1) * * *

(ii) Notification by control center or emergency response communications center. The control center or the emergency response communications center, as applicable under the plan, shall promptly notify outside emergency responders, adjacent rail modes of transportation, and appropriate railroad officials that a passenger train emergency has occurred. Each railroad shall designate an employee responsible for maintaining current emergency telephone numbers for use in making such notifications.

(2) * * *

(ii) Control center and emergency response communications center personnel. The railroad's emergency preparedness plan shall require initial training of responsible control center personnel and any emergency response communications center personnel employed by the railroad, under a contract or subcontract with the railroad, or employed by

a contractor or subcontractor to the railroad, as well as periodic training at least once every two calendar years thereafter, on appropriate courses of action for each potential emergency situation under the plan. At a minimum, the initial and periodic training shall include:

(A) Territory familiarization;

(B) Procedures to retrieve and communicate information to aid emergency personnel in responding to an emergency situation;

(C) Protocols governing internal communications between appropriate control center and emergency response communications center personnel whenever an imminent potential or actual emergency situation exists, as applicable under the plan; and

(D) Protocols for establishing and maintaining external communications between the railroad's control center or emergency response communications center, or both, and emergency responders and adjacent modes of transportation, as applicable under the plan.

(iii) Initial training schedule for current employees of the railroad, current employees of contractors and subcontractors to the railroad, and individuals who are contracted or subcontracted by the railroad. The railroad's emergency preparedness plan shall provide for the completion of initial training of all on-board and control center employees, and any emergency response communications center personnel, who are employed by the railroad, under a contract or subcontract with the railroad, or employed by a contractor or subcontractor to the railroad on the date that the plan is conditionally approved under § 239.201(b)(1), in accordance with the following schedule:

* * * * *

(iv) Initial training schedule for new railroad employees, contractor and

subcontractor employees, and contracted individuals. The railroad's emergency preparedness plan shall provide for the completion of initial training of all on-board and control center personnel, as well as any emergency response communications center personnel, who are hired by the railroad, contracted or subcontracted by the railroad, or hired by the contractor or subcontractor to the railroad after the date on which the plan is conditionally approved under § 239.201(b)(1). Each individual shall receive initial training within 90 days after the individual's initial date of service.

(v) Testing of on-board, control center, and emergency response communications center railroad employees, contractor or subcontractor employees, and contracted individuals. The railroad shall have procedures for testing a person being evaluated for qualification under the emergency preparedness plan who is employed by the railroad, under a contract or subcontract with the railroad, or employed by a contractor or subcontractor to the railroad. The types of testing selected by the railroad shall be:

(A) Designed to accurately measure an individual's knowledge of his or her responsibilities under the plan;

* * * * *

(8) Procedures regarding passengers with disabilities. The railroad shall have procedures in place to promote the safe evacuation of passengers with disabilities under all conditions identified in its emergency preparedness plan. These procedures shall include, but not be limited to, a process for notifying emergency responders in an emergency situation about the presence and general location of each such passenger when the railroad has knowledge that the passenger is on board the train. This paragraph does not require the

railroad to maintain any list of train passengers.

* * * * *

4. Section 239.105 is amended by revising paragraph (c)(3) to read as follows:

§ 239.105 Debriefing and critique.

* * * * *

(c) * * *

(3) Whether the control center or the emergency response communications center promptly initiated the required notifications, as applicable under the plan:

* * * * *

Subpart C—Review, Approval, and Retention of Emergency Preparedness Plans

5. Section 239.201 is amended by revising paragraphs (a) and (b)(3)(i) to read as follows:

§ 239.201 Emergency preparedness plan; filing and approval.

(a) Filing of plan and amendments. (1) Filing of plan. Each passenger railroad to which this part applies and all railroads hosting its passenger train service (if applicable) shall jointly adopt a single emergency preparedness plan for that service, and the passenger railroad shall file one copy of that plan with the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Mail Stop 25, Washington, DC 20590, not less than 60 days prior to commencing passenger operations. Any passenger railroad that has an emergency preparedness plan approved by FRA as of (the effective date of the final rule) is considered to have timely-filed its plan. The emergency preparedness plan shall include the name, title, address, and

telephone number of the primary person on each affected railroad to be contacted with regard to review of the plan, and shall include a summary of each railroad's analysis supporting each plan element and describing how every condition on the railroad's property that is likely to affect emergency response is addressed in the plan.

(2) Filing of amendments to the plan. (i) Except as provided in paragraph (a)(2)(ii) of this section, each subsequent amendment to a railroad's emergency preparedness plan shall be filed with FRA by the passenger railroad not less than 60 days prior to the proposed effective date. When filing an amendment, the railroad must include a written summary of the proposed changes to the previously approved plan and, as applicable, a training plan describing how and when current and new employees and contractors would be trained on any amendment.

(ii) If the proposed amendment is limited to adding or changing the name, title, address, or telephone number of the primary person to be contacted on each affected railroad with regard to the review of the plan, approval is not required under the process in paragraph (b)(3)(i) of this section. These proposed amendments may be implemented by the railroad upon filing with FRA's Associate Administrator for Railroad Safety/Chief Safety Officer. All other proposed amendments must comply with the formal approval process in paragraph (b)(3)(i) of this section.

(b) * * *

(3) * * *

(i) Except as provided in paragraph (a)(2)(ii) of this section, FRA will normally review each proposed plan amendment within 45 days of receipt. FRA will then notify the

primary contact person of each affected railroad of the results of the review, whether the proposed amendment has been approved by FRA, and if not approved, the specific points in which the proposed amendment is deficient.

* * * * *

Subpart D—Operational (Efficiency) Tests; Inspection of Records and Recordkeeping

6. Section 239.301 is revised to read as follows:

§ 239.301 Operational (efficiency) tests and inspections.

(a) Requirement to conduct operational (efficiency) tests and inspections. Each railroad to which this part applies shall periodically conduct operational (efficiency) tests and inspections of on-board, control center, and, as applicable, emergency response communications center personnel employed by the railroad, under a contract or subcontract with the railroad, or employed by a contractor or subcontractor to the railroad, to determine the extent of compliance with its emergency preparedness plan.

(1) Written program of operational (efficiency) tests and inspections. Operational (efficiency) tests and inspections shall be conducted pursuant to a written program. New railroads shall adopt such a program within 30 days of commencing rail operations. The program shall—

(i) Provide for operational (efficiency) testing and inspection on appropriate courses of action in response to various potential emergency situations and on the responsibilities of an employee of the railroad, of an individual who is a contractor or subcontractor to the railroad, or an employee of a contractor of subcontractor to the railroad, as they relate to the railroad's emergency preparedness plan.

(ii) Describe each type of operational (efficiency) test and inspection required, including the means and procedures used to carry it out.

(iii) State the purpose of each type of operational (efficiency) test and inspection.

(iv) State, according to operating divisions where applicable, the frequency with which each type of operational (efficiency) test and inspection is to be conducted.

(v) Identify the officer(s) by name, job title, and, division or system, who shall be responsible for ensuring that the program of operational (efficiency) tests and inspections is properly implemented. A railroad with operating divisions shall identify at least one officer at the system headquarters who is responsible for overseeing the entire program and the implementation by each division.

(vi) Require that each railroad officer who conducts operational (efficiency) tests and inspections be trained on those aspects of the railroad's emergency preparedness plan that are relevant to the operational (efficiency) tests and inspections that the officer conducts, and that the officer be qualified on the procedures for conducting such operational (efficiency) tests and inspections in accordance with the railroad's written program of operational (efficiency) tests and inspections and the requirements of this section.

(2) The operational (efficiency) testing program required by paragraph (a)(1) of this section may be combined with the written program of operational (efficiency) tests and inspections required by § 217.9(c) of this chapter.

(b) Keeping records of operational (efficiency) tests and inspections. Each railroad to which this part applies shall maintain a written record of the date, time, place, and result of each operational (efficiency) test and inspection that was performed in accordance

with paragraph (a) of this section. Each record shall also specify the name of the railroad officer who administered the test or inspection, the name of each employee tested, and sufficient information to identify the relevant facts relied on for evaluation purposes.

(c) Retention of operational (efficiency) test and inspection records. Each record required by paragraph (a) of this section shall be retained at the system headquarters of the railroad and, as applicable, at the division headquarters for the division where the test or inspection was conducted, for one calendar year after the end of the calendar year to which the test or inspection relates. Each such record shall be made available to representatives of FRA and States participating under part 212 of this chapter for inspection and copying during normal business hours.

(d) Keeping records of written program of operational (efficiency) tests and inspections. Each railroad shall retain one copy of its current operational (efficiency) testing and inspection program required by paragraph (a) of this section and one copy of each subsequent amendment to such program. These records shall be retained at the system headquarters, and, as applicable, at each division headquarters where the operational (efficiency) tests and inspections are conducted, for three calendar years after the end of the calendar year to which they relate. These records shall be made available to representatives of FRA and States participating under part 212 of this chapter for inspection and copying during normal business hours.

(e) Annual summary of operational (efficiency) tests and inspections. Before March 1 of each calendar year, each railroad to which this part applies shall retain at the system headquarters of the railroad and, as applicable, at each of its division headquarters,

one copy of a written summary of the following with respect to its previous calendar year activities: the number, type, and result of each operational (efficiency) test and inspection, stated according to operating divisions as applicable, that was conducted as required by paragraph (a) of this section. These records shall be retained for three calendar years after the end of the calendar year to which they relate and shall be made available to representatives of FRA and States participating under part 212 of this chapter for inspection and copying during normal business hours.

Issued in Washington, DC, on _June 21, 2012_____ .

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Joseph C. Szabo,
Administrator.

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